METRO KAJANG CONSTRUCTION SDN BHD

v.

EKA BAHTERA SDN BHD

HIGH COURT MALAYA, SHAH ALAM
LOW HOP BING J
[SUMMONS WRIT NO: MT3-22-558-99]
15 JUNE 2001

CIVIL PROCEDURE: *Affidavits - Whether defective - Omission to include name of interpreter - Requirement of separate jurats - Whether to be complied with - Rules of the High Court 1980, O. 41 rr. 1(7), (8), 2(2)*

CIVIL PROCEDURE: *Injunction - Ex parte interim injunction - Application to set aside after expiry of two-week life span - Whether application time-barred - Rules of the High Court 1980, O. 29 r. 1(2B)*

The defendant applied in encl. 12 to set aside the *ex parte* interim injunction obtained by the plaintiff against the defendant. Enclosure 12 was supported by two affidavits, *ie*, encls. 11 and 28, both of which were affirmed by the same deponent. The plaintiff raised two preliminary objections, *ie*, (i) that the jurat contained in encls. 11 and 28 were defective for want of compliance with O. 41 rr. 1(7), 1(8) and 2(2) of the Rules of the High Court 1980 ('RHC'); and (ii) that encl. 12 was barred by O. 29 r. 1(2B) RHC as the *ex parte* interim injunction had lapsed two weeks after it was granted to the plaintiff.

Held:

[1] Form 78(d) requires the name of an interpreter who is not a court interpreter to be entered twice, firstly, after the words "through the interpretation of …" and secondly, after the words "the said …". However, there was an omission in both the jurats in encls. 11 and 28.

[2] Under O. 41 r. 1(7) RHC the person before whom the jurat is to be sworn is a Commissioner of Oaths. It is therefore the Commissioner of Oaths who must also complete the jurat and the jurat can only be said to be completed by the Commissioner of Oaths if the name of the interpreter is entered twice in the given blanks. The jurats in both the affidavits were not completed by the Commissioner for Oaths as the name of the interpreter was only entered once. Therefore, there was non-compliance of O. 41 r. 1(7) RHC. There is a plethora of authorities to show that O. 41 is mandatory and a failure to comply therewith will render the impugned affidavit defective, null and void.

[3] Order 41 r. 2(2) RHC applies where there are multiple deponents to whom the oath is administered in different languages, thereby requiring the use of a separate jurat for each of them to be sworn in each language. As both the jurats herein were for a single deponent, O. 41 r. 2(2) was not applicable.

[4] Since the *ex parte* interim injunction was obtained on 27 May 1999, the duration of two weeks under the old rule prior to the amendment (in 23 September 2000 when the two weeks were substituted with 21 days) in O. 29 r. 1(2B) RHC applied. Unless sooner revoked or set aside, the *ex parte* interim injunction would have lapsed on 9 June 1999. The jurisdiction to invoke such revocation or setting aside might only be exercised before the expiry of the two-week life span of the *ex parte* interim injunction.

[5] Since the defendant applied to set aside the *ex parte* interim injunction after it had lapsed, *ie*, 11 June 1999, the application was time-barred as there was no longer any *ex parte* interim injunction in existence for the defendant to urge the court to set aside.

[Preliminary objections upheld; defendant's application in encl. 12 dismissed with costs.]

Case(s) referred to:

Elias Mooin & Anor v. Dato' Zainal Abidin Johari [1997] 3 CLJ 455 ***(refd)***

Gan Thing Phing v. Ong Gek Kim (No 2) [1999] 7 CLJ 146 ***(refd)***

GMX Associates Pte Ltd & Anor v. Lee Yew Pooi (Berniaga Di Bawah Nama dan Gaya Universal Trading Co) [1998] 5 CLJ 245 ***(refd)***

Han Euu Tiam v. Phang Kui Fatt & Ors [1999] 4 CLJ 395 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(refd)***

Kumaran C Raman v. Radakrishnan CK Raman [1999] 6 CLJ 262 ***(refd)***

Mohamed Mustafa A Nalla Ibrahim & Anor v. Syed Mohamed Madar Rawther [1995] 1 CLJ 219 ***(refd)***

S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1995] 2 CLJ 152 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 7, O. 29 r. 1(2B), O. 41 rr. 1(7), (8), (9), 2(2), 3, Forms 78(b), (c), (d)

For the plaintiff - HY Lee (Ronnie Yap); M/s Ling & Theng Book
For the defendant - G Rajasingam; M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Preliminary Objections

The plaintiff had on 27 May 1999 obtained an *ex parte* interim injunction against the defendant.

The defendant had on 11 June 1999 applied by way of summons in chambers in encl. (12) to set aside the said *ex parte* interim injunction. Enclosure (12) is supported by two affidavits *viz*. encls. (11) and (28), both of which were affirmed by a deponent named Kwan Yoke Kian.

At the hearing of encl. (12), two preliminary objections were raised on behalf of the plaintiff against the defendant's application in encl. (12). These two preliminary objections are as follows:

1. The jurat contained in encls. (11) and (28) are defective for want of compliance with O. 41 r. 1(7), r. 1(8) and r. 2(2); and

2. Enclosure (12) is barred by O. 29 r. 1(2B).

All references to any order or rule in this judgment are references to the order or rule in the Rules of the High Court 1980.

Submission For The Plaintiff

Encik H.Y. Lee and Encik Ronnie Yap, both learned counsel for the plaintiff contended *inter alia*, that the respective jurat in the two affidavits affirmed by the deponent ie, Kwan Yoke Kian are defective as these two jurats did not contain the signature of the interpreter Yee Mei Ken and that there was no proof that the affidavits have been interpreted in the language that is understood by the said deponent. It was also argued for the plaintiff that the interpretation in the jurat was not completed and signed by the Commissioner for Oaths, who merely signed in respect of the affirmation of the affidavit.

The essence of the submission in respect of the second preliminary objection is that the *ex parte* interim injunction obtained by the plaintiff on 27 May 1999 has lapsed on 9 June 1999 ie, at the end of the two weeks from the date on which it was granted and since the defendant's application was filed on 11 June 1999, the *ex parte* interim injunction was no longer in existence to be set aside. He added that the defendant's application in encl. (12) is time-barred.

Response By Defendant

Encik G. Rajasingam learned counsel for the defendant in response contended that O. 41 clearly does not require the interpreter or translator to sign a jurat. Similarly, he added that Forms 78(b) and (c) in Appendix A to the Rules of the High Court 1980 contain no such requirement, so long as the contents of the affidavits have been duly interpreted by the interpreter.

Defendant's learned counsel was, however, prepared to concede that going by the case of *Han Euu Tiam v. Phang Kui Fatt & 2 Ors* [1999] 4 CLJ 395, the respective jurat in encls. (11) and (28) would seem to be defective for reasons stated in that decision but learned counsel urged upon this court not to adopt the reasoning of the learned judge in that case as the court's attention was not drawn to O. 1 r. 7 which allows variation to the Forms in Appendix A to the Rules of the High Court 1980.

In respect of the second preliminary objection on the ground that the defendant's application in encl. (12) was time-barred, it was contended for the defendant that encl. (12) was filed with the primary intention of setting aside the *ex parte* interim injunction obtained by the plaintiff on 27 May 1999 against the defendant. It was emphasised for the defendant that that *ex parte* order ought not to have been made in the first place ie, it was obtained on the strength of misrepresented facts and misleading affidavits.

It was also submitted for the defendant that the *ex parte* interim injunction obtained by the defendant on 8 June 1999 was dissolved on the premise of the defendant's undertaking to comply with paras. (a), (b) and (c) of the injunction. It was stated for the defendant that the *ex parte* interim injunction did not automatically lapse on the 14th day ie, 9 June 1999, as the undertaking could still be enforced by the plaintiff by way of committal proceedings.

It was further submitted for the defendant that there is nothing in O. 29 which requires the defendant to take out the application to set aside the *ex parte* interim injunction within the 14 days.

Decision Of The Court

The Jurats

Both the jurats in encls. (11) and (28) which were affirmed in support of the defendant's application in encl. (12) contain the same wordings and are reproduced as follows:

DIIKRARKAN oleh KWAN YOKE KIAN yang tersebut di Kuala Lumpur pada 10 haribulan Jun, 1999 menerusi terjemahan oleh YEE MEI KEN yang tersebut setelah mula-mula sekali bersumpah bahawa dia telah dengan sebenarnya, dengan nyatanya dan dengan dapat didengar menterjemahkan isi kandungan afidavit ini kepada deponen KWAN YOKE KIAN dan bahawa dia akan sebenarnya dan sejujurnya menterjemahkan ikrar yang sedang hendak dikendalikan ke atas dirinya KWAN YOKE KIAN yang tersebut itu.

My translation:

AFFIRMED by the said KWAN YOKE KIAN at Kuala Lumpur on the 10th day of June 1999 through the interpretation of the said YEE MEI KEN having been first sworn that he had truly, distinctly and audibly translated the contents of his affidavit to the deponent KWAN YOKE KIAN and that he would truly and faithfully interpret the affirmation about to be administered unto him the said KWAN YOKE KIAN.

The respective jurat appears to be in Form 78(d) of Appendix A to the Rules of the High Court 1980 and is used for an affidavit by a person who does not understand English or Bahasa Malaysia: See *Gan Thing Phing v. Ong Gek Kim (No 2)* [1999] 7 CLJ 146. It was signed by Kwan Yoke Kian as deponent in juxtaposition to the jurat, and below the jurat in the presence of the Commissioner for Oaths, one Mr. Massa Singh Gill.

For purposes of completeness, Form 78(d) is reproduced as follows:

(d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ... day of ..., 19 ... at ... through the interpretation of ... (if the interpreter is not a Court Interpreter add the following:

"the said ... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said ...").

Before me
...
Commissioner for Oaths

Upon a close scrutiny of the said jurat by reference to Form 78(d), it can be immediately observed that Form 78(d) would require the name of an interpreter who is not a court interpreter to be used twice, *viz*, the first one to be included after the words "through the interpretation of ..." which name must be repeated after the words "the said ...". However, this was not done by the learned counsel who drafted the abovesaid jurat and there appears to be an omission in both the jurats in encls. (11) and (28).

Therefore, a substantial issue was raised in respect of the jurats ie, as to whether the jurats contained in encls. (11) and (28) are defective for want of compliance with O. 41 r. 1(7), r. 1(8) and r. 2(2). These rules are reproduced as follows:

> O. 41 r. 1(7) : "Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn."
>
> O. 41 r. 1(8) : "A jurat must be in one of the forms in Form 78."
>
> O. 41 r. 2(2) : "When the oath is administered to deponents in different languages there shall be a separate jurat for those sworn in each language."

In purported compliance with O. 41 r. 1(7) and O. 41 r. 1(8), the defendant as observed above, has apparently adopted Form 78(d). I shall consider this issue in greater detail later in this judgment as it raises an important point of practice and procedure. Order 41 r. 2(2) in my view would apply where there are multiple deponents, to whom the oath is administered in different languages, thereby requiring the use of a separate jurat for each of them to be sworn in each language. As both the jurats before me are for a single deponent and not for deponents affirming in different languages, I hold that O. 41 r. 2(2) has no application here.

As alluded to above, an important point of practice and procedure is called into question in respect of O. 41 r. 1(7) and r. 1(8) which require a more detailed discussion. Under O. 41 r. 1(7), it is mandatory for the jurat "to be completed and signed by the person before whom it is sworn." What exactly do these words mean and require in the context of O. 41 r. 1(7)? Giving these words their ordinary popular and grammatical meaning, it seems clear to me that the jurat must be completed and signed by the person before whom it is sworn. The person before whom it ie, the jurat is to be sworn is a Commissioner for Oaths. It is therefore the Commissioner for Oaths who must also complete the jurat, and the jurat can only be completed by the Commissioner for Oaths, by filling the name of the interpreter in the two blanks ie, twice. The pertinent question is whether both the jurats in encls. (11) and (28) have been **completed** by the Commissioner for Oaths. The answer is obviously in the negative. The jurat manifests only the name of the interpreter once, whereas there are two blanks for the name of the interpreter Yee Mei Ken to be entered ie, twice, before it can be said to have been "completed ... by the person before whom it is sworn" as prescribed in O. 41 r. 1(7). There is a plethora of authorities to the effect that O. 41 contains provisions which are

mandatory and a failure to comply therewith would render the impugned affidavit or affidavits defective and null and void.

By way of illustration, under O. 41 r. 3 where it appears to the person administering the oath that the deponent is illiterate or blind, he must certify in the jurat that:

(a) the affidavit was read in his presence to the deponent;

(b) the deponent seemed perfectly to understand it; and

(c) the deponent made his signature or mark in his presence.

and the affidavit shall not be used in evidence without such a certificate unless the court is otherwise satisfied that it was read and appeared to be perfectly understood by the deponent. The provisions of O. 41 r. 3 were held to be mandatory in nature. In the circumstances, where O. 41 r. 3 has not been meticulously complied with, as in *S. Ravi a/l G. Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor.* [1995] 2 CLJ 152, I held that the affidavit is defective and shall not be used in evidence.

O. 41 r. 1(7) and (8) have been held by Mohd. Hishamudin bin Mohd Yunus, J in *Han Euu Tiam v. Phang Kui Fatt & 2 Ors, (supra),* to be mandatory requiring strict compliance and a departure from the prescribed Form 78(a) was held to constitute a substantial deviation and defective and so inadmissible.

Similarly in *Gan Thing Phing v. Ong Gek Kim (No 2) (supra),* where the jurat does not state that the plaintiff has been translated the contents of his affidavits, the affidavits filed therein were disregarded by Kamalanathan Ratnam, J.

Again in *Kumaran C Raman v. Radakrishnan CK Raman* [1999] 6 CLJ 262, Abdul Kadir Musa, J held that any omission of the fundamental requirements under O. 41 r. 1(7), (8) and (9) would render any affidavit intended to be used in any application defective, unless and until it is cured by way of amendment with leave of the court.

Having carefully considered both the jurats in encls. (11) and (28) and the above relevant provisions under O. 41 r. 1(7) and (8) and Form 78(d), and judicial pronouncements, I hold that the above impugned jurats have not been completed by the person before whom it was sworn and therefore the affidavits are defective and hence hereby disregarded, in which case, there are no affidavits in support and so encl. (12) is hereby dismissed *in limine* with costs.

However, on the assumption for a moment that I have erred in this finding, I shall now proceed to consider the second preliminary objection.

Has The *Ex Parte* Interim Injunction Lapsed?

Order 29 r. 1(2B) provides as follows:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex parte* application shall automatically lapse at the end of the two weeks from the date on which it is granted.

This was the governing rule prior to 23 September 2000 when the two weeks were substituted with 21 days (see Rules of the High Court (Amendment) 2000 P.U.(A) 342). Since the *ex parte* interim injunction in the instant case was obtained on 27 May 1999, the duration of two weeks under the old rule applied, so that unless sooner revoked or set aside, the *ex parte* interim injunction would have lapsed on 9 June 1999. The defendant's application in encl. (12) was filed on 11 June 1999 ie, two days after 9 June 1999.

The intention as enacted in O. 29 r. 1(2B) is clear in that the life span of an *ex parte* interim injunction is two weeks, at the end of which it shall automatically lapse. The *ex parte* interim injunction may sooner be revoked or set aside, but the jurisdiction to invoke such revocation or setting aside may, in my view, only be exercised so long as the aggrieved party, in this case the defendant, files an application before the expiry of the two-week life span of the *ex parte* interim injunction: *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293, 310 per Siti Norma Yaakob, JCA (now Federal Court judge).

In the instant case, since the defendant has applied to set aside the *ex parte* interim injunction after it has lapsed, the application is time-barred as there is no longer any *ex parte* interim injunction in existence for the defendant to urge the court to set aside. In *GMX Associates Pte Ltd & Anor v. Lee Yew Pooi (Berniaga Di Bawah Nama Dan Gaya Universal Trading Co)* [1998] 5 CLJ 245 Steve Shim Lip Kiong, J (now CJ (Sabah & Sarawak) also held, *inter alia*, that under O. 29 r. 1(2B), any application to revoke or set aside an *ex parte* interim injunction has to be done within two weeks from the grant of the said injunction.

A similar conclusion was reached by James Foong, J in *Elias bin Mooin & Anor v. Dato' Zainal Abidin bin Johari* [1997] 3 CLJ 455 wherein it was held, *inter alia*, that without an *ex parte* interim injunction in existence, by virtue of its automatic lapse upon the expiry of two weeks from the date it was granted, there could be no issue on damages.

The two weeks time frame enacted for the life span of an *ex parte* interim injunction is set and rigid : per Jeffrey Tan JC (now J) in *Mohamed Mustafa a/l A Nalla Ibrahim & Anor v. Syed Mohamed a/l Madar Rawther* [1995] 1 CLJ 219.

In the light of the above abundant authorities, with which I agree, the obvious conclusion is that the defendant's application in encl. (12) made after the two-week period prescribed in O. 29 r. 1(2B) is time-barred.

Much has been said by learned counsel for the defendant that notwithstanding the lapse of the *ex parte* interim injunction on 9 June 1999, the defendant has on 8 June 1999 given an undertaking to the court in terms of paras. (a), (b) and (c) of the *ex parte* interim injunction and that a breach of such undertaking could be enforced by the plaintiff by way of commital proceedings against the defendant. However, the subject matter before me revolves around the construction of O. 29 r. 1(2B) and its legal implications. Order 29 r. 1(2B) has made no reference to an undertaking. In my view, O. 29 r. 1(2B) is not intended to cover an undertaking or a breach thereof. The limited scope enacted in O. 29 r. 1(2B) covers and indeed is merely confined to an *ex parte* interim injunction and does not extend to any undertaking.

On the foregoing grounds, I hold that there are merits in the plaintiff's preliminary objections which are hereby upheld. The defendant's application in encl. (12) is consequently dismissed with costs.